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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

DON JUAN CORNELIUS,

Defendant and Appellant.

C079302

(Super. Ct. No. 13-CR-20527)

Defendant Don Juan Cornelius challenges his conviction on felony and misdemeanor assault charges and attempting to dissuade a witness. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a), 240, 136.1, subd. (a)(2).)¹ He contends he received ineffective assistance of counsel and the trial court erred by refusing to dismiss his prior strikes. In addition to questioning the wisdom of allowing prisoners to play horseshoes, we affirm.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2012, Mule Creek State Prison inmate Isaac Loza was sitting in a chair near the recreation area. Defendant, also an inmate at Mule Creek State Prison, approached and asked the recreation equipment attendant, Michael King (who was defendant's cellmate), for two horseshoes. A fight ensued between defendant and Loza, and defendant used the horseshoes to hit Loza on his head, shoulder, arms, and back. Loza tried to block the blows in order to defend himself. Loza and defendant ignored correctional officers' instructions to stop fighting, so correctional officers broke up the fight by spraying Loza and defendant with pepper spray. Loza suffered bruises to his arms and back, and his head was split open and required 10 staples. Defendant had dried blood on his hands but did not suffer any injuries, other than the pepper spray.

Loza testified at trial that defendant instigated the June 2012 fight and "came at me swinging [the horseshoes] at me." In contrast, King and defendant testified Loza was the instigator. According to King and defendant, Loza began yelling at defendant, and defendant tried to brush it off and shake Loza's hand. Loza then pulled defendant toward him, causing defendant to lose his balance, and the two began arguing and physically fighting. According to King, defendant threw the first punch.

In August 2013, defendant was on the yard and asked another inmate where King was (defendant and King were no longer cellmates). Defendant had previously asked King to change his statement about the June 2012 incident and now wanted to talk to King about it again. Defendant found King, talked with him, and then walked away. Defendant then returned with a rock in his hand and chased King around a table, threatening to "bust [King] in his head," if he did not change his statement. Defendant raised the rock over his head, as if ready to hit King. Just then, a correctional officer approached to investigate and observed a "heated conversation" between defendant and King. Defendant and King dispersed, and defendant dropped the rock over a fence. When a correctional officer later interviewed defendant about the incident, defendant said

he had spoken with his attorney and had approached King “about getting on the same page and changing some testimony.” At trial, defendant testified he never asked King to change his testimony and never threatened him with a rock.

A jury convicted defendant of felony assault with a deadly weapon (against Loza) and found true defendant inflicted great bodily injury. (§§ 245, subd. (a)(1), 12022.7, subd. (a).) The jury also convicted defendant of misdemeanor assault (against King) and felony attempting to dissuade a witness. (§§ 240, 136.1, subd. (a)(2).) Defendant waived jury trial on the priors allegations, and the court found them true, including: (1) a 1971 conviction of robbery (§ 211); (2) a 1979 conviction of robbery (§ 211); (3) a 1983 conviction of assault with a deadly weapon with use of a firearm (§§ 245, subd. (a)(1), 12022.5); and (4) a 1990 conviction of manslaughter (§ 192). (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d).)

Prior to sentencing, defendant’s appointed trial counsel was replaced by Stanford Law School’s Three Strikes Project. Defendant filed a *Romero* motion to dismiss his prior serious convictions, arguing he did not fall under the spirit of the Three Strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); see also § 1385, subd. (a).) Defendant claimed the June 2012 assault was unique to in-prison circumstances, and he produced expert evidence regarding the prison environment and the issues leading up to defendant’s assault on Loza. According to defendant’s expert, Loza may have been preying upon King for money and sexual favors, and defendant’s protection of King and participation in self-help programs may have created tension with Loza and been a factor in the June 2012 incident. In addition, defendant presented expert evidence about the reasonableness of defendant’s response to the fight with Loza, in the context of prison culture. His expert testified that an inmate who is challenged in prison must either inform staff of the threat, or “engage until the threat is gone completely or the issue is stopped by the staff members.”

Defendant also argued he was already serving a life term, was extremely unlikely to recidivate, and was committed to rehabilitation. Defendant provided “laudatory remarks” from four prison staff members describing his participation in prison self-help programs, including a letter from the prison chaplain attesting defendant could be a positive member of the community if released. Defendant had a low prison security classification score and a nearly perfect disciplinary record. Defendant also produced California Static Risk Assessment results showing he was unlikely to commit a new crime if released from custody. Defendant also argued his age (he is now 64) and health problems, including a stroke, seizures, cognitive impairment, and hypertension, make him unlikely to recidivate. Defendant’s expert also opined these health problems may have challenged defendant’s “ability to think straight and make good choices.”

Although defendant had been a “model inmate,” the trial court denied defendant’s *Romero* motion. The court found defendant was asking it to treat his crime differently because of the prison culture, and the court reasoned it could not do so because all victims and crimes should be treated the same. In addition, the crime was “a fairly violent” and “aggressive act” that caused great bodily injury. Also, defendant’s criminal history was extensive, and he had been incarcerated most of his adult life.

The trial court sentenced defendant to two 25-year-to-life consecutive terms for assault with a deadly weapon and attempting to dissuade a witness, plus three consecutive years for the great bodily injury enhancement, plus 20 years for the priors. (§§ 1170.12, subds. (a)-(d), 667, subds. (a)(1) & (b)-(i).)

DISCUSSION

I

Defendant contends he received ineffective assistance of counsel at trial because his lawyer failed to produce expert correctional evidence regarding the circumstances surrounding the assault, including prisoner politics and defendant’s mental impairments. Although such evidence was presented during his *Romero* hearing, he contends such

evidence would have bolstered his argument at trial that the June 2012 fight with Loza was in self-defense.

To establish ineffective assistance of counsel, a defendant must show counsel's performance was "deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Defendant must also show "resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid.*)

A reviewing court defers to "counsel's reasonable tactical decisions . . . , and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Defendant has a heavy burden on appeal, as a reviewing court will reverse a conviction based on incompetence of counsel " " "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." ' ' ' (*Id.* at p. 437.)

The record is silent as to why defendant's trial counsel did not present expert evidence regarding prison culture or defendant's mental capacity. In these circumstances, a reviewing court will reject a claim of ineffective assistance of counsel unless counsel was asked for an explanation and failed to provide one or there simply could be no satisfactory explanation.² (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; see also *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from the unreasonable failure to investigate."].) The record does not indicate counsel was asked for an explanation. In addition, counsel may have determined such evidence was unnecessary,

² Such a claim of ineffective assistance of counsel is more appropriately made in a petition for writ of habeas corpus. (*People v. Visciotti* (1992) 2 Cal.4th 1, 47, fn. 17.)

especially since the jury had already heard both King and defendant testify Loza was the aggressor. Moreover, counsel may have determined there was insufficient evidence of a mental impairment during the June 2012 fight, or that such evidence would make defendant less credible. Alternatively, counsel may have determined such evidence would lead a jury to conclude defendant did not act in self-defense because he was unable to properly interpret the situation and form a reasonable belief that he or someone else was in imminent danger of suffering bodily injury or being unlawfully touched.

In addition, defendant has failed to show he suffered prejudice. Defendant produced evidence at trial in support of his self-defense argument, including testimony from King and defendant identifying Loza as the instigator. The jury apparently did not find this testimony credible, especially since King testified defendant threw the first punch. Defendant never explains how expert evidence suggesting potential sources of tension between defendant and Loza would have been relevant, let alone reasonably likely to produce a more favorable verdict, especially since defendant never testified at trial about his participation in self-help programs or his protection of King. We reject defendant's claim of ineffective assistance of counsel.

II

Defendant contends the trial court erred by refusing to dismiss his prior strikes. He argues that his prior convictions occurred nearly 30 years ago and are remote. Defendant also contends he is not the type of person the Legislature intended to sentence to life in prison, given his medical conditions and his exemplary behavior in prison, apart from the incidents in question. We disagree.

Section 1385, subdivision (a) gives the trial court discretion to strike a prior felony conviction allegation if the dismissal is in furtherance of justice. (*Romero, supra*, 13 Cal.4th at pp. 507-508.) The court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be

deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review for abuse of discretion a trial court's refusal to dismiss a prior strike conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) A trial court abuses its discretion only when its decision is “so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) As long as the trial court “balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law,” on appeal we will not disturb a trial court's decision. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Despite defendant's contentions, he has not shown himself to fall outside the spirit of the three strikes law. The assault may have been outside the norm of defendant's generally good prison behavior, and prison conditions may have increased the likelihood of an incident between defendant and Loza. Still, we agree with the trial court that the mitigating factors were outweighed by the aggressive and violent nature of the assault, which caused great bodily injury to Loza. In addition, defendant had an extensive criminal history, and he has been incarcerated for almost all of the intervening period between his most recent prior conviction and the convictions at issue here. (See *People v. Massey* (1987) 192 Cal.App.3d 819, 825 [gap in criminal history due to incarceration did not render earlier convictions too remote].) We find no error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.